TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 201

ALBERT RAUH, PETITIONER,

vs.

TRAVIS COUNTY, TEXAS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED

(16,831.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 267.

ALBERT WADE, PETITIONER,

vs.

TRAVIS COUNTY, TEXAS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 5, 1899.

a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1896, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit, and the Honorable William T. Newman, United States district judge for the northern district of Georgia.

ALBERT WADE, Plaintiff in Error,
vs.
TRAVIS COUNTY (TEXAS), Defendant in Error.

Be it remembered that heretofore, to wit, on the 6th day of August, 1896, a transcript of the record of the above-styled cause, from the circuit court of the United States for the western district of Texas, was filed in the office of the clerk of the United States circuit court of appeals, in the words and figures following, to wit:

1 United States Circuit Court of Appeals, Fifth Circuit.

ALBERT WADE, Plaintiff in Error,
vs.
TRAVIS COUNTY, Defendant in Error. } No. 527.

In the above-entitled cause it is stipulated, between the parties thereto, by their respective attorneys, that the following parts of the record shall be printed, viz:

Plaintiff's first amended original petition, and Exhibits A, B, C, and B 2; defendant's first amended original answer; order sustaining demurrers and dismissing cause; opinion of the court; plaintiff's bills of exception Nos. 1 and 2, and plaintiff's assignments of error.

And it is further stipulated that the remaining parts of the record shall not be printed unless otherwise ordered by the court.

GEO. F. PENDEXTER,
T. W. GREGORY, AND
WEST & COCHRAN,
Attorneys for Plaintiff in Error.
GEO. CALHOUN, *County Att'y, and*
FISET & MILLER,
Attorneys for Defendant in Error.

Endorsed: No. 527. Albert Wade *vs.* Travis County. Stipulation as to printing record. Filed Aug. 6, 1896. J. M. McKee, clerk.

Opinion of the Court. Filed March 13, 1896.

In the Circuit Court of the United States for the Western District of Texas, Austin Division.

ALBERT WADE
vs.
TRAVIS COUNTY.

Suit is brought by the plaintiff, who is a citizen of the State of Illinois, against Travis County, a municipal corporation of the State of Texas, to recover upon interest coupons which have been detached from 47 certain bonds, issued by the defendant, for the purpose of building an iron bridge across the Colorado river. Defendant demurs to the petition.

Plaintiff is the owner and holder of coupons representing the interest due on all of said bonds, April 10th, 1893, April 10th, 1894, and April 10th, 1895, for $60 each, and the suit is brought to recover the amount thereof, with interest. The contract pro-
2 viding for the construction of the bridge and the issuance of county bonds in payment therefor, was executed by the King Iron Bridge & Manufacturing Company, on the one hand, and the duly constituted county authorities on the other, July 3rd, 1888. Briefly stated, by the terms of the contract, the bridge company agreed to erect the superstructure of an iron bridge over the Colorado river in a thorough workman-like manner, the work to begin on the 3rd day of August, 1888, and to be completed on the 15th day of November following. In consideration of the erection of the bridge, the county agreed to pay the bridge company the sum of $47,000 in bonds, payable in 20 years and bearing six per cent. interest, payments to be made as follows: 50 per cent. of the value of the work as the work progressed and the balance on the final acceptance and completion of the bridge.

Before entering upon the merits of the case a preliminary question has been suggested by the district judge, who is sitting with the circuit judge, touching the disqualification of the former to participate in the decision. That question is as follows: The district judge is a resident and citizen of Travis county, Texas, and a tax-payer thereof. This suit involves the validity of bonds and coupons issued by the county. The question arises: Has the district judge such direct pecuniary interest in the result of the suit as disqualifies him from sitting in the case? Authorities examined by the court leave the question in some doubt, and for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that disqualification on the part of the district judge does not exist. See U. S. Rev. Stat., § 601; City of Dallas *vs.* Peacock, 33 S. W. Rep., 220; City of Austin *vs.* Nalle, 85 Tex., 520; Moses *vs.* Julian, 45 N. H., 52; Peck *vs.* Essex Freeholders, 21 N. J. Law, 656; Gregory *vs.* R. R. Co., 4 Ohio State, 675; Pearce *vs.* Atwood, 13 Mass., 324; The State *et al. vs.* Crane, 36 N. J. Law, 394;

Board of Justices *vs.* Fennimore, 1 N. J. Law, 190. And we suggest to counsel the propriety of reserving proper exceptions in order that the point may be conclusively settled by the court of appeals.

The merits of the controversy involve interesting though not difficult questions for solution. The demurrers of defendant challenge the plaintiff's right to recover on the ground that, at the date of the execution of the contract between the bridge company
3 and the county, no provision was made to pay the interest on the debt created and provide a sinking fund as required by the organic law. The petition and accompanying exhibits fail to disclose that the county commissioners' court made special provision, by order or resolution, touching a sinking fund or interest on the particular bonds in question. But it is insisted by plaintiff that on the 23rd day of February, 1888, the contract having been executed on July 3rd, 1888, the county commissioners' court, at a regular term thereof, levied taxes for the year 1888 on all taxable property of the county, as follows: "An annual ad valorem tax of 20 per cent. for general purposes; and an annual ad valorem tax of 15 per cent. for road and bridge purposes on each $100 worth of property situated in said county and taxable by law;" and further, that on the 13th day of February, 1889, the commissioners' court of the county levied taxes for the year 1889, as follows: "An ad valorem tax of 15 per cent. on each $100 worth of property for road and bridge purposes, and an ad valorem tax of 5 cents on each $100 worth of property to create a sinking fund for bridge bonds and to pay the interest of said bonds." In this connection it is further alleged in the petition that the defendant delivered to the bridge company, on its contract for erecting the bridge, bonds as follows: On December 6th, 1888, 5 bonds; on December 22nd, 1888, 10 bonds; on February 12th, 1889, 10 bonds, and on July 3rd, 1889, the remaining 22 of said 47 bonds. The contention of the plaintiff is, that, in making the general tax levies above set forth, the county intended to provide for a sinking fund and interest on the bonds issued to the bridge company. The defendant, however, insists that at the date of the execution of the contract for erecting the bridge, the commissioners' court should have made a distinct and specific provision for such interest and sinking fund. The constitutional provision bearing upon the question is the following: Section 7, article 11. "But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund."

The imperative mandate of the constitution is that no debt for any purpose shall ever be incurred in any manner by a
4 county unless provision is made at the time of creating the same for levying and collecting a sufficient tax for the interest and sinking fund above specified. "The word 'debt,'" says Mr. Justice Denman, "as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and

reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation." McNeill *vs.* City of Waco, 33 S. W. Rep., 324, citing authorities. And we think, as intimated in McNeill *vs.* City of Waco, that a contract entered into for the construction or erection of any public improvement, authorized by law, would be the creation or incurring of a debt within the meaning of the constitution. It follows that, contemporaneously with the execution of the contract by the defendant and bridge company, to wit: July 3rd, 1888, the county commissioners' court should have made provision, by levy of a tax or otherwise, for a sinking fund, and the interest on the bonds issued for the erection of the bridge. See Millsaps *vs.* City of Terrell, 60 Fed. Rep., 193 (Cir. Ct. App'ls); Berlin Iron Bridge Co. *vs.* City of San Antonio, 62 Fed. Rep., 882. The levy made by the commissioners' court, in February, 1888, could not be held applicable to the bonds in controversy, for the manifest reason that the contract for the erection of the bridge was not then in existence nor even in contemplation of the parties, so far as the allegations of the petition disclose. The general levy made in February, 1889, cannot be held applicable to the bonds of the bridge company for two reasons. First: It was made some six months after the execution of the contract, and second: The order of the commissioners' court, authorizing the levy, makes no reference whatever to the bonds in controversy nor to the contract between the county and the bridge company. In other words, no provision was made, by levy of a tax or otherwise, by the county commissioners' court, either contemporaneously with the execution of the contract, or subsequently, for a sinking fund and interest on the bonds, issued for the construction of the bridge. See Bassett *vs.* City of El Paso, 88 Texas, 169. Hence, we are led to the conclusion that the bonds and, as a necessary corollary, the coupons detached therefrom are invalid and not enforceable as such against the county.

The demurrers of the defendant should be sustained, and it is so ordered.

T. S. MAXEY,
District Judge.

McCormick, circuit judge, concurs.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Opinion. Filed Mar. 13, 1896. D. H. Hart, clerk, by O. H. Millican, deputy.

Plaintiff's First Amended Original Petition. Filed March 19, 1896.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. 2284.

And now comes the plaintiff and under leave of the court files this its 1st amended original petition, in lieu of its original petition filed on the 18th day of January, 1896:

In the Circuit Court of the United States for the Western District of Texas, at Austin.

ALBERT WADE
vs.
TRAVIS COUNTY.

To the honorable judges of said court:

Your petitioner, Albert Wade, hereinafter styled plaintiff, brings this suit against Travis County, hereinafter styled defendant, and respectfully shows and represents to the court:

First. That plaintiff is a resident citizen of the county of Madison, in the State of Illinois; that the defendant, Travis County, is a body corporate and politic by virtue of the laws of the State of Texas, being one of the counties of said State, and situated in the western district of Texas, and within the jurisdiction of this court.

That D. A. McFall, a resident citizen of Travis county, Texas, is the duly qualified and acting county judge of said Travis county.

Second. That heretofore, to wit, on July 3rd, 1888, the defendant, being fully authorized so to do, entered into a contract with the King Iron Bridge Manufacturing Company, of Cleveland, Ohio, by the terms of which said company contracted and agreed with defendants to build, paint, and make complete and have ready for the use of defendant, by the 15th day of November, 1888, the superstructure of an iron highway bridge for public use over the Colorado river, at a point where the Montopolis road crosses
6 said river, in Travis county, Texas. In consideration of which, defendant, by the terms of said contract, agreed and undertook to pay to said company the sum of $47,000.00 for said bridge, said amount to be payable in the bonds of said defeddant, payable in twenty years from date, bearing six per cent. interest per annum. A copy of said contract is hereto annexed, marked "Exhibit A," and made a part hereof. That said bridge was and is a permanent improvement.

Third. That prior to the making of said contract, to wit, February 23d, 1888, the defendant, acting by and through its commissioners' court, at a regular term of said court, levied taxes for the year 1888, and subsequent years until otherwise ordered, on all of the property situated in Travis county, and made taxable by law, as follows:

An annual ad valorem tax of 20c. for general purposes; and an annual ad valorem tax of 15c. for road and bridge purposes, on each $100 worth of property, situated in said county and taxable by law. A copy of the order levying said tax is hereto attached and marked "Exhibit B," and made a part hereof.

3½. That thereafter, to wit, on November 13th, 1888, the defendant, acting by and through its commissioners' court, at a regular term of said court, levied for the purpose of buying or constructing bridges, an annual ad valorem tax of 15c. on the $100.00 to pay interest and create a sinking fund for the redemption of eleven bonds, of the denomination of one thousand dollars each, bearing 8 % in-

terest, running until the 10th of April, 1899, a certified copy of which order is attached hereto and marked "Exhibit B 2," and made a part hereof.

Fourth. That thereafter, to wit, on the 13th day of February, 1889, defendant, acting by and through its commissioners' court, at a regular term of the said court, by order duly passed, levied taxes on all property situated in Travis county, and taxable by law, for the year 1889, and each and every year thereafter, until otherwise ordered, as follows:

An ad valorem tax of 15c. on each $100 worth of property for road and bridge purposes, and an ad valorem tax of 5c. on each $100 worth of property to create a sinking fund for bridge bonds, and to pay the interest of said bonds. A copy of said order is hereto attached, marked "Exhibit C," and made a part hereof.

7 Fifth. Plaintiff alleges that the taxable values of Travis county for the year 1887 was, to wit..... $13,455,320.00
For the year 1888..... 13,507,790.00
For the year 1889..... 14,163,180.00

and that the tax of 15c. on the $100 for road and bridge purposes levied on February 23rd, 1888, and February 13th, 1889, and 5c on the $100, to create a sinking fund and pay interest on bridge bonds, so levied by the defendant as aforesaid, and the said levy of November 13th, 1888, were each sufficient to pay all interest to accrue on said bonds, and provide a sufficient sinking fund for their redemption at maturity, and that said taxes were so levied by the defendant for the purpose, and did make provision to pay the interest to accrue on said bonds, and to provide a sinking fund for their redemption at maturity, and that said taxes so levied were each sufficient to pay the interest and create a sinking fund on all other valid bonds previously issued by defendant for road and bridge purposes, as also on the bonds above described.

5½. That a general tax of 15c. for road and bridge purposes, levied for the year 1888, and the additional general levy of 15c. for 1889, and special levy of 5c. to create a sinking fund for bridge bonds, and to pay interest on same, have been collected for the years 1888 and 1889, and for every year thereafter, by the proper officers of Travis county, and paid into the county treasury, as was also the said general tax of 15c. for the year 1888.

Sixth. That on December 6th, 1888, pursuant to the terms of said contract, and in *paty* payment of the bridge therein contracted for, the defendant executed and delivered five of its bonds, numbered one to five, inclusive, for the sum of one thousand dollars each, due on April 10th, 1908, and having attached thereto coupons for sixty dollars each, except the first coupon, representing the annual interest to become due on said bonds up to the day of their maturity. Said bonds and coupons being, by their terms, payable to bearer at the treasury of the county of Travis.

Seventh. That thereafter, to wit: on December 22nd, 1888, the defendant issued and caused to be delivered ten of its bonds of like

character and denomination, and for the same purposes, as those above described, numbered 6 to 15, inclusive; and on February 12th, 1889, caused ten more of said bonds to be issued and
8 delivered, said bonds being numbered 16 to 25, inclusive. And afterwards, on July 3rd, 1889, caused twenty-two of said bonds, numbered 26 to 47, inclusive, to be issued and delivered, thus making the total of bonds provided for in said contract, and that each bond bore the date on which it was delivered and bore interest from that date.

Eighth. Plaintiff further says, that each and all of said bonds were signed by J. M. Brackenridge, then county judge of Travis county, and countersigned by Frank Brown, then county clerk of said county, and registered by Ed. Anderson, then county treasurer of said county, and that each and all of the coupons were signed by said Brackenridge, county judge, and countersigned by said Brown, county clerk.

8½. That at the time said agreement was entered into with the King Iron Bridge Manufacturing Company, the fund to be realized from said levy of February 23, 1888, had not been appropriated for any other purpose by said county, or at least a sufficient portion of it remained unappropriated to pay the interest and sinking fund on said $47,000.00 of bonds, and that when the said 15 bonds were delivered in December 1888, said fund, as well as the fund to be realized from the levy of November 13th, 1888, was still unappropriated for other purposes to an extent sufficient to pay the interest and sinking fund on said 15 bonds; that when said ten bonds were delivered on February 12, 1889, said funds were still unappropriated for other purposes, to an extent sufficient to pay the interest and sinking fund on said 10 bonds; and that when said 22 bonds were delivered, on July 3rd, 1889, there was a portion of each of the funds to be realized from the said 15¢. and 5c. levies made on February 13th, 1889, unappropriated for other purposes, sufficient to pay the interest and sinking fund on said 22 bonds.

Plaintiff further alleges that at and prior to February 23rd, 1888, when said first tax levy was made by the commissioners' court of said Travis county, said court had in contemplation and intended to build the bridge across the Colorado river at the point where said Montopolis road crossed the same, and also had in contemplation the building of other bridges of minor importance in said Travis county. That said court at its said term and at previous terms had deliberated upon and determined to erect said bridge and to pay for the same in bonds and made said levy for the
9 purpose and with the view of providing a fund to run from year to year, sufficient to pay the annual interest and to provide the sinking fund therefor, required by law. But plaintiff alleges that no minute or entry upon the minutes of said court was ever made, showing such previous deliberations and determination on the part of the said court.

Plaintiff further alleges that by the terms of said tax levy of February 23rd, 1888, the said court made the same to operate and run from year to year thereafter, and that, by the subsequent orders

levying taxes, as hereinbefore set out, the said court conformed to the provisions of said first order, and levied the full amount of fifteen cents on the one hundred dollars' worth of taxable property in said Travis county, for the purpose of constructing and providing roads and bridges in said county, including said Montopolis bridge.

And plaintiff further alleges that when said contract was entered into by said county with the King Iron Bridge Manufacturing Company, and at all times thereafter, when said county delivered its said bonds in payment for said bridge, the said different tax orders and levies were in full force and effect, as shown by the minutes of said court; and that, in delivering said bonds, the said different levies became part of said contract against said county.

Ninth. That the defendant, by its acts aforesaid, caused each and all of said bonds thereto attached to be placed on the market for sale, and that afterwards, to wit: about the 1st of January, 1893, plaintiff, for a full and valuable consideration in open market, purchased the coupons, representing the interest due on all of said bonds, on April 10th, 1893, April 10th, 1894, and April 10th, 1895. And that he is still the legal owner and holder of the same.

That each of said coupons, except the first, save in number and date of maturity, is in words and figures as follows, to wit:

"$60. Due April 10, 18—. No. —.

The County of Travis will pay to bearer, at the treasury of the county of Travis, sixty dollars, on April 10th, 1895, being interest for one year on bond No. —.

J. M. BRACKENRIDGE,
County Judge of Travis County.

FRANK BROWN,
County Clerk of Travis County."

10 Tenth. That on the — day of ——, 1895, plaintiff presented all of said coupons to the county commissioners' court of said Travis county, and demanded the allowance thereof; that said court neglected and refused to audit and allow said coupons or any part thereof. That afterwards, to wit: on the 16th day of January, 1896, he presented all of said coupons to the treasurer of Travis county, Texas, at the treasury of said county, and demanded payment thereof, which was refused, and the said coupons are now all due and unpaid.

Eleventh. That the order hereinbefore referred to, levying taxes for the year 1889, was passed at a regular term of the said commissioners' court, to wit: on February 13th, 1889, the court having adjourned over from the following day, and on the day immediately following the order authorizing the delivery of ten of said bonds, to wit: Nos. 16 to 25, inclusive, as aforesaid.

Premises considered: plaintiff prays that the defendants be cited to answer hereto by service of process on the said D. A. McFall, county judge, as aforesaid, and upon final hearing, for judgment for the full amount due on said coupons, to wit: the sum of eight

thousand four hundred and sixty ($8,460) dollars, as principal, and interest at six per cent. per annum on each of said coupons from the dates that they respectively matured.

For general relief, costs, etc.

T. W. GREGORY,
WEST & COCHRAN,
GEO. F. PENDEXTER,
Attorneys for Plaintiff.

"EXHIBIT A."

It is hereby ordered by the commissioners' court of Travis county that the contract entered into by and between said commissioners' court and the King Iron Bridge and Manufacturing Company, of Cleveland, Ohio, be and the same is hereby ratified and adopted; and that the contract as aforesaid be made a part of this order, and be made a matter of record, to wit: This contract made this 3rd day of July, 1888, by and between the King Iron Bridge and Manufacturing Company, of the city of Cleveland, and State of Ohio, party of the first part, and Travis County through its legal representatives, the commissioners' court of the county of Travis, of the State of Texas, party of the second part, witnesseth:

11 That the party of the first part contracts and agrees with the party of the second part to build, paint, and make complete, and have ready for use by the 15th day of November, 1888, for the party of the second part, the superstructure of an iron highway bridge, cantilever construction, over the stream called the Colorado river, at a point where the Montopolis bridge crosses said stream, in the county of Travis, and State of Texas, namely: Extreme length of bridge, 1,000 feet, five spans, roadway eighteen feet. Specifications attached hereto form part of this contract. All the materials for said bridge are to be furnished by the said party of the first part, are to be of good and suitable quality, and the work is to be done in a thorough, workmanlike manner. And the party of the second part contracts and agrees to pay the party of the first part the sum of $47,000.00 for the said bridge, payable as follows: 50 per cent. of the value of the work as the work progresses, and the balance on the final acceptance and completion of the work, in bonds issued by said county, payable in twenty years, bearing six per cent. interest. And the party of the first part was not to be held responsible for unavoidable delays caused by transportation, the elements, mobs, the enemies of the Government, strikes of workingmen or acts of Providence. The party of the second part reserves the right to negotiate the said bonds. The said party of the first part agreeing to commence work upon the 3rd day of August, 1888, said bridge to be guaranteed by said company to be equal to class B standard copper; and the said party of the first part is to forfeit $50.00 per day after the 15th day of November, 1888. The party of the first part is

to furnish a bond in the sum of $50,000.00 for the faithful performance of said contract.

(Signed) KING IRON BRIDGE & MANUF'NG CO.,
Per S. A. OLIVER & BRO., *Agents.*
J. M. BRACKENRIDGE,
County Judge.
WILLIAM WELLMER,
C. C. Pr. No. 1.
A. G. KEMP, *C. C. Pr. No.* 2.
S. C. GRANBERRY,
C. C. Pr. No. 3
J. W. CLOUD, *C. C. Pr. No.* 4.

In the presence of—

L. T. NOYES AND
P. G. ROACH.

Signed in duplicate.

12 "EXHIBIT B."

FEBRUARY 23, 1888.

And thereupon it is ordered (all the members of the commissioners' court being present) that there be levied and collected an annual county tax on each hundred dollars' worth of the cash value thereof on all real and movable property situated and rendered for taxation in Travis county, until otherwise ordered, to be estimated in the lawful currency of the United States (except so much as is exempted from taxation by the laws of this State), on the first day of January, 1888, and on the first day of January of each and every year thereafter, as follows, to wit:

An annual ad valorem tax of twenty cents for general purposes, an annual ad valorem tax of fifteen cents for road and bridge purposes; an occupation tax upon every occupation taxed by law equal to one-half the rates allowed by law to be taxed for State purposes, except occupations upon which there is a specific rate of taxation, payable in the county, fixed by law.

"EXHIBIT C."

FEBRUARY 13TH, 1889.

And thereupon it is ordered (all members of the commissioners' court being present) that there be levied and collected an annual ad valorem county tax on each one hundred dollars' worth of the cash value thereof, on all real and movable property situated and rendered for taxation in Travis county, until otherwise ordered, to be estimated in the lawful currency of the United States (except so much as is exempted from taxation by the laws of this State), on the first day of January, 1889, and on the first day of January of each an every year thereafter, as follows, to wit:

An annual ad valorem tax of twenty-five cents for general purposes, fifteen cents for road and bridge purposes, court-house and jail tax of five cents; an ad valorem tax of five cents to create a sinking fund for bridge bonds to pay the interest of said bonds, and an occupation tax upon every occupation taxed by law equal to one-half the rates allowed by law to be taxed for State purposes, except occupations upon which there is a specific rate of taxation payable to the county fixed by law.

13 EXHIBIT B 2.

TUESDAY MORNING, *November* 13, *A. D.* 1888.

Court met pursuant to adjournment. Present: Hon. J. M. Brackenridge, county judge, presiding; and county commissioners William Wellmer, A. G. Kemp, S. C. Granberry and John W. Cloud; whereupon the following proceedings were had, to wit:

Whereas, by an act of the legislature of the State of Texas, approved April 4th, 1887, the county commissioners' courts of the several counties of this State are authorized and empowered to issue the bonds of said county with interest coupons attached, for such amounts as may be necessary for the purpose of buying or constructing bridges for public uses within such county, said bonds to run not exceeding twenty years, and bear interest at any rate not to exceed eight per cent. per annum, and to levy an annual and ad valorem tax not to exceed fifteen cents on the one hundred dollars' valuation sufficient to pay the interest on and create a sinking fund for the redemption of said bonds, the sinking fund not to be less than four per cent. on the full sum for which the bonds are issued. And,

Whereas, Travis county, Texas, has already a bonded indebtedness for said purpose of seventy-four thousand dollars, bearing interest at the rate of six per cent. per annum, payable twenty years after date, but redeemable before maturity at the pleasure of the county at any time after three years, and the further issuance of bonds to the amount of eleven thousand dollars, with interest at the rate of eight per cent. per annum for said purpose, will not, with the said seventy-four thousand dollars, make a larger amount of bonds than a tax of ten cents on the one hundred dollars' valuation of property in the said county will liquidate in ten years; and,

Whereas, the further issuance of bonds to the amount of eleven thousand dollars for said purpose is necessary.

It is therefore ordered by the county commissioners' court of Travis county, Texas, in open session at a regular term of said court, and when all the members of said court are present, that bonds of said Travis county, with interest coupons attached, be issued for said purpose of buying or constructing bridges for public uses within said county to the amount of eleven thousand dollars, of the denomination of one thousand dollars each, with interest from date until paid at the rate of eight per cent. per annum, interest
14 payable annually, on the 10th day of April of each year, at the State treasury in Austin, Texas, said bonds to run until

the 10th day of April, A. D. 1899, and redeemable at any time before the maturity at the pleasure of said county, and that the county judge, county clerk and county treasurer of said county be and they are hereby authorized, instructed and required to prepare, execute, register, issue and sell said bonds according to law and this order, and that an annual ad valorem tax of fifteen cents on the one hundred dollars valuation of property subject to taxation in said county be and the same is hereby levied and shall be assessed and collected to pay the interest on and create a sinking fund for the redemption of said bonds, and that the sinking fund herein provided for shall be four per cent. on the full sum for which the said bonds are issued.

J. M. BRACKENRIDGE, *C. Judge.*
W. M. WELLMER, *C. C. Pr.* 1.
A. G. KEMP, *C. C. Pr.* 2.
S. C. GRANBERRY, *C. C.* 3.
J. W. CLOUD, *C. C. Pr. No.* 4.

THE STATE OF TEXAS, }
County of Travis. }

I, Jno. W. Hornsby, clerk of the county court within and for the State and county aforesaid, do hereby certify that the above and foregoing is a true and correct copy of an order made and entered by the commissioners' court of Travis county, Texas, on the 13th day of November, A. D. 1888, as the same appears of record in Book "F" on pages Nos. 154, 155 and 156 of the Minutes of the Commissioners' Court.

Given under my hand and seal of said court, this the 25th day of November, A. D. 1895.

[SEAL.] JOHN W. HORNSBY,
Clerk County Court, Travis County, Texas.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Plaintiff's 1st amended original petition. Filed March 19, 1896. D. H. Hart, clerk, by O. H. Millican, deputy.

Defendant's First Amended Original Answer. Filed March 19, 1896.

In the Circuit Court of the United States for the Western District of Texas, at Austin.

ALBERT WADE
v.
TRAVIS COUNTY. } No. 2284.

Comes now the defendant in the above styled and numbered cause, and, by leave of the court for that purpose first had and obtained, files this, its first amended answer, in lieu of and as a substitute for its original answer filed February 4th, 1896, and says:

This defendant, demurring generally to plaintiff's first amended

original petition, filed March 19th, 1896, says the same is insufficient in law and does not authorize any recovery, and said petition does not state any cause of action against this defendant, and of this defendant prays the judgment of the court.

GEO. CALHOUN,
County Attorney, and
FISET & MILLER,
Attorneys for Defendant.

And specially excepting to plaintiff's petition, defendant says the same is insufficient, among other things, in these, that:

1. It fails to allege that, at the time the debt was created for which the bonds were issued, upon the coupons of which this suit is brought, any provision was made for the interest and, at least, two per cent. sinking fund upon said bonds.

2. It fails to allege that, at any time, any legal provision was made to raise a fund sufficient for the interest and sinking fund of said bonds.

3. The tax levy of February 23, 1888, was not in contemplation of law any tax levy, because such attempted levy was not made at a regular term of the court.

4. The fifth paragraph of the petition and other parts of said petition setting up that taxes were levied for the purpose, and the levies did make provision to pay the interest on said bonds, are insufficient, in this, that they do not set out and do not purport that said purpose or provisions were predicated on any order or resolution to that effect entered on the minutes of the commissioners' court.

5. Paragraph 3½ of plaintiff's petition and Exhibit B 2 relating thereto should be stricken out, because neither the allegations in said paragraph nor the exhibit show that the bonds in question in this suit were in anywise connected with said order attached as Exhibit B 2, nor do the allegations of said paragraph refer to the bonds here in issue.

6. That part of the petition is insufficient which alleges that the commissioners' court had in contemplation and intended when taxes were levied to build the bridge in question, because it
16 is not shown that any order evincing such intention was made on the minutes or in any other way, and because the petition itself avers that no minute or entry of such intention was made.

Wherefore, this defendant prays the judgment of the court on each of said exceptions.

GEORGE CALHOUN,
County Attorney, and
FISET & MILLER,
Attorneys for Defendant.

And if the general demurrer and special exceptions be overruled, then this defendant denies all and singular the allegations made, and as made in plaintiff's petition, demands strict proof of the same, and of this defendant puts itself upon this country.

And specially answering, this defendant says, that prior to the time of the alleged creation of the debt for which the bonds were issued on the coupons of which this suit is brought, the defendant had issued and delivered and there were outstanding at the time of the creation of the said contract and are now outstanding bridge bonds amounting to $74,000, said issue having been made on May 12th, 1887, under and by virtue of the legal authority of the statute and the constitution, and said bonds were properly issued and a levy was properly made by the commissioners' court to meet the interest and sinking fund to be levied and collected under said bond issue of $74,000, and whatever provisions during the years 1887, 1888, 1889 and 1890 were made for the levy of a tax by the commissioners' court for interest and sinking fund for bridge bonds or for bridge purposes, was made for the purpose of meeting said issue of $74,000, and not the issue made, as alleged by plaintiff, of bonds amounting to $47,000.

Wherefore this defendant says, that at no time was provision made, as the law and the constitution of this State provides, to meet the interest and sinking fund of the said issue of $47,000 of bonds, the foundation of plaintiff's claim, and therefore said bonds are void and invalid and the coupons cannot be recovered upon, of all which this defendant puts itself upon the country.

GEO. CALHOUN,
County Attorney, and
FIS-T & MILLER,
Attorneys for Defendant.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. First amended original answer of defendant, Travis County. Filed M'ch 19, 1896. D. H. Hart, clerk.

17 *Order Overruling Demurrer and Dismissing Cause, July* 13, 1896.

AUSTIN, TEXAS, MONDAY, *July* 13*th*, 1896.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. 2284.

On this the 13th day of July, 1896, was called for trial in its order the cause of Albert Wade *vs.* Travis County, No. 2284, on the docket of this court, and thereupon came the plaintiff, by his attorneys, and the defendant, by its attorneys, and then came on to be heard the general demurrer and special exceptions of defendant, Travis County, filed March 19th, 1896, to the first amended original petition of the said plaintiff, also filed March 19th, 1896, and the argument of counsel on said general demurrer and special exceptions of said defendant to said plaintiff's petition having been heard, it is the opinion of the court that the law is for the defendant, and plaintiff declining to amend his said petition.

It is therefore ordered, considered and adjudged by the court, that plaintiff's cause of action be and the same is hereby dismissed, and that the defendant, Travis County, go hence without day, and that the defendant, Travis County, recover of the plaintiff, Albert Wade, all costs in this behalf expended, for all which let execution issue.

To which said ruling of the court and judgment thereon the plaintiff, Albert Wade, in open court, excepted.

Plaintiff's Bill of Exceptions No. 1. *Filed July* 14, 1896.

In the Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Sitting at Austin.

ALBERT WADE *vs.* TRAVIS COUNTY. } No. —.

Plaintiff's bill of exceptions No. 1.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following proceedings were had:

The district judge, the Hon. T. S. Maxey, presented the question of his disqualification to sit in the trial of this cause, because, as stated by him (and agreed to by plaintiff and defendant), he owned property subject to taxation in the city of Austin, in Travis county, Texas, and was at the date of said trial, a tax-payer of said city and county, which question of disqualification was duly consid-
18 ered by by the court composed of the Hon. A. P. McCormick, circuit judge, and the Hon. T. S. Maxey, district judge.

And, after due consideration, said court held that the Hon. T. S. Maxey, judge as aforesaid, was not disqualified, whereupon said court proceeded to try said cause, to which ruling of the court, the plaintiff then and there in open court excepted, and now prays that this bill of exceptions be signed, sealed and made a part of the record in this cause, which is accordingly done.

Signed July 14, 1896.

T. S. MAXEY, *Judge.*

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Pl't'ff's bill of exceptions No. 1.. Filed July 14, 1896. D. H. Hart, clerk.

Plaintiff's Bill of Exceptions No. 2. Filed July 14, 1896.

In the Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Sitting at Austin.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. —.

Plaintiff's bill of exceptions No. 2.

Be it remembered, that upon the trial of the above entitled and numbered cause, the following proceedings were had therein:

Plaintiff having presented to the court his first amended original petition, filed in lieu of his original petition (which amended petition is set out in this record, and by agreement of parties made in open court is to be considered as incorporated in this bill), the defendant thereupon presented to the court for its action thereon a general demurrer and special exceptions and demurrer contained in its first amended original answer, which said first amended original answer is set out in this record, and by agreement of counsel made in open court, is to be considered as incorporated in this bill, and the court having considered said general demurrer and special exceptions, sustained said general demurrer and special exceptions.

To which ruling of the court in sustaining said general demurrer and special exceptions, plaintiff then and there in open court excepted, and now prays that this bill of exceptions be allowed, signed and filed as a part of the record herein.

And that the first amended original petition and first
19 amended original answer be taken and considered as if incorporated and written into this bill, agreeably to the agreement of counsel made in open court, all of which is accordingly done.

Signed this July 14, 1896.

T. S. MAXEY, *Judge.*

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Pl't'ff's bill of exceptions No. 2. Filed July 14, 1896. D. H. Hart, clerk.

Plaintiff's Assignment of Errors. Filed July 14, 1896.

In the Circuit Court of the United States for the Fifth Circuit, Western District of Texas, Sitting at Austin.

ALBERT WADE
vs.
TRAVIS COUNTY. } No. —.

Comes now Albert Wade and assigns the following as the errors committed against him on the trial of the above numbered and entitled cause:

1. The court erred in holding that the Hon. T. S. Maxey, district judge, was qualified to sit in the trial of this cause, as shown by plaintiff's bill of exceptions No. 1.

2. The court erred in sustaining the defendant's general demurrer to plaintiff's petition.

3. The court erred in sustaining each of defendant's special demurrers to plaintiff's petition.

4. The court erred in holding that no cause of action was set up in plaintiff's petition, and in dismissing this cause from the docket of the court.

Wherefore, said Albert Wade prays that the judgment rendered against him be reversed and the cause remanded.

GEO. F. PENDEXTER,
T. W. GREGORY, AND
WEST & COCHRAN,
Attorneys for Plaintiff in Error.

Endorsed: No. 2284. Albert Wade *vs.* Travis County. Plaintiff's assignment of errors. Filed July 14th, 1896. D. H. Hart, clerk.

20 *Argument and Submission.*

United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1896.

APRIL 28, 1897.

(Extract from Minutes.)

ALBERT WADE
vs.
TRAVIS COUNTY (TEXAS). } No. 527.

This cause was regularly called this day, and was submitted to the court after argument by Mr. J. P. Blair, for plaintiff in error, and by Mr. Franz Fiset, for defendant in error.

Judgment.

November Term, 1896.

JUNE 16, 1897.

(Extract from the Minutes.)

ALBERT WADE
vs.
TRAVIS COUNTY (TEXAS). } No. 527.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Texas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed at the costs of the plaintiff in error.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1896.

Filed June 16, 1897.

ALBERT WADE, Plaintiff in Error,
vs.
TRAVIS COUNTY, TEXAS, Defendant in Error. } No. 527.

Error to the United States circuit court for the western district of Texas.

Before Pardee, circuit judge, and Newman, district judge.

21 NEWMAN, district judge, delivered the opinion of the court:

Suit was brought in the United States circuit court for the western district of Texas, by the plaintiff in error, against the defendant in error, Travis County, Texas, to recover upon interest coupons which had been detached from 47 bonds issued by Travis county, for the purpose of building an iron bridge across the Colorado river. The coupons were for $60 each. The defendants demurred to plaintiff's petition, the demurrer was sustained, and an exception duly entered.

The question in the case was, and is, as to whether the bonds issued by the county of Travis, and from which the coupons sued on were detached, were issued in conformity to law, and to the constitution of Texas on the subject. This question of the validity of the bonds depends first and mainly on the construction of a provision of the constitution of Texas, sec. 7, article XI.

Section 7 is as follows: "All counties and cities bordering on the coast of the gulf of Mexico are hereby authorized, upon a vote of two-thirds of the tax-payers therein (to be ascertained as may be provided by law) to levy and collect such tax for construction of sea walls, breakwaters or sanitary purposes as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund; and the condemnation of the right of way for the erection of such works shall be fully provided for."

The contention for the defendant in error is, that the latter clause of this section, that "no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, etc." is applicable to the contract made by the county for the building of this bridge, and that the petition of the plaintiff failing to show compliance with it, the contract is void, the bonds illegally issued and the county not bound for their payment.

The contention on the other hand is, that the language of
22 this last clause must be read in connection with the preceding portion of the section, and taking that section together with existing conditions, and the action of the constitutional convention in connection with the adoption of this section, that this last clause must be held, as the former part of the section, to apply only to the counties bordering on the coast of the gulf of Mexico. It is said that immediately preceding that action of the convention in placing this section in the constitution, a great hurricane had swept over the gulf coast, causing the city of Galveston to be submerged and resulting in great destruction to life and property on the entire coast. It is said that this caused section 7 to be placed in the constitution, and that it must be read and construed in the light of the situation at that time. We do not understand this last clause to be so restricted. It seems to us to be entirely separate from the preceding part of the section, and to refer to all the cities and counties of the State. Judge Maxey so held in the court below, and we agree with him, that this is the proper construction of the section.

This is the view heretofore taken by this court of this section of the constitution of Texas, as will be seen by an examination of the case of Milsap *vs.* The City of Terrell, 60 Fed., 193, and Quaker City National Bank *vs.* Noland County, 66 Fed., 883. While the question made here was not distinctly made in those cases, the court seems to act in both cases upon the assumption that the construction which applies in the latter part of the section to all cities and counties in the State, is the correct one. But even if the question was doubtful here, we would be controlled by the decisions of the supreme court of Texas construing this provision of the State constitution. An examination of the decisions of that court leaves no doubt that its construction is in accordance with that of the circuit judge in the case at bar.

In the opinion of the court in the case of The City of Terrell *vs.* Dissaint, 71 Texas, 770, this language is used: "Section 7 of the same article contains this still more emphatic declaration: But no debt for any purpose shall ever be incurred in any manner by any
23 city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund. In Corpus Christi *vs.* Woesner, 58 Texas, 462, it was intimated that there might be a question whether the provisions quoted applied to cities other than such as have more than ten thousand inhabitants; but the determination of the point was not necessary to the decision of that case, and it was not decided. The question is presented in the case before us, and we are of opinion that they must be held to apply to all cities alike. It is true that section 5 relates mainly to cities having more than ten thousand inhabitants, and provides that they may be chartered by special acts of the legislature, and fixes the limits of their taxing power. Section 7 also relates in the first place to counties and cities upon the seacoast, and authorizes them to levy and collect taxes for the con-

struction of sea walls, breakwaters, and sanitary purposes, and to create debts for these objects. But the provisions we have quoted contain no word or words which restrict their application to the cities previously mentioned in the same section. The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; that is, that no city should create any debt without providing by taxation for the payment of the sinking fund and interest."

In the case of Nolan *vs.* State, 83 Texas, 182, the latter clause of the section of the constitution under consideration is treated as applying to all counties of the State (p. 200).

It is said that, in deciding the case of The City of Waxahatchie *vs.* Brown, 67 Tex., 519, the court took a different view of this clause of article 7, and in fact restricted its application to cities and counties bordering on the gulf of Mexico, and that decision, it is argued, entered into and became a part of the contract for building the bridge and issuing the bonds in the case here. Without determining whether or how far that decision of the Supreme Court, even if it went to the extent claimed, would have the effect indicated, it is sufficient to say that an examination of that case shows that it was not the intention of the court to construe this clause of the
24 constitution at all. The only mention made in that decision of this provision of the constitution was incidental and only made in the summing up of the different constitutional provisions bearing upon the question under consideration in that case. The question made here was not made there, and there was evidently no intention on the part of the court to decide it. The opinion we entertain of the proper construction of this clause of the constitution, the former decisions of this court, and the decisions of the supreme court of the State of Texas, all combine to sustain the circuit judge in his decision on this question in the court below.

The opinion in Brazoria County *vs.* Youngstown Bridge Company, recently decided in this court, is in harmony with and fully supports the conclusions herein announced.

The judgment of the court below, sustaining the demurrer to the plaintiff's declaration, should be affirmed, and it is so ordered.

Clerk's Certificate.

United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 24 pages contain a true copy of the record upon which the cause was heard and determined in the United States circuit court of appeals for the fifth circuit, and of the proceedings had therein, and of the opinion of said court in the case of Albert Wade *vs.* Travis County (Texas), No. 527, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 17 day of March, A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: Case No. 16,831. U. S. C. C. of appeals, 5th circuit. Term No., 267. Albert Wade, petitioner, *vs.* Travis County, Texas. Filed March 25, 1898.

25 United States Circuit Court of Appeals, Fifth Circuit.

ALBERT WADE
v.
TRAVIS COUNTY. } No. —.

Stipulation.

It is agreed by the undersigned, counsel of record, that the record now on file in the office of the clerk of the Supreme Court of the United States in the matter of the petition for certiorari in the above-entitled case shall be taken and held as the record of this cause, and that a duly certified copy of this stipulation be attached to the writ of certiorari as part of the return thereto by the clerk of the United States circuit court of appeals for the fifth circuit.

J. P. BLAIR,
T. W. GREGORY,
FRANK W. HACKETT,
Counsel for Albert Wade.
GEO. CALHOUN,
County Attorney, Travis County, Texas.
FRANZ FISET AND C. H. MILLER,
Attorneys for Travis County, Texas.

26 United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 1 page is a true copy of the agreement in reference to the return to the writ of certiorari in the case of Albert Wade *v.* Travis County, as the same remains on file and of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of May A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Albert Wade is plaintiff in error and Travis County, Texas, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the western district of Texas, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit
28 court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

29 [Endorsed:] Case No. 16,831. Supreme Court of the United States. No. 267, October term, 1898. Albert Wade *vs.* Travis County, Texas. Writ of certiorari and return. Filed May 9, 1898.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, in accordance with agreement of counsel in the within-named case, a certified copy of which is hereto annexed and made a part hereof, for return to the within writ do hereby certify that the transcript of the record of the within-named cause, now on file in the office of the clerk of the Supreme Court of the United States, is a true, full, and perfect transcript of the record in said cause as the same now remains on file and of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 5th day of May, A. D. 1898.

J. M. McKEE,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.